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No. (1)

In the
Supreme Court of the United States

MOHAMMED AL-ADAHI, DETAINEE,
CAMP DELTA, GUANTANAMO BAY NAVAL STATION,
GUANTANAMO BAY, CUBA;
MIRIAM ALI ABDULLAH AL-HAJ,
NEXT FRIEND OF MOHAMMED AL-ADAHI,
Petitioners,

v.

BARACK OBAMA;
ROBERT M. GATES; TOM COPEMAN,
Respondents,

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In a civil case in which different inferences can be drawn from a trial record containing live testimony, whether the Court of Appeals improperly revised the "clearly erroneous" standard of review articulated in *Anderson v. City of Bessemer*, 470 U.S. 564 (1985), by imposing "conditional probability," as an amorphous legal standard.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Mohammed Al-Adahi, along with his next friend Miriam Ali Abdullah Al Haj, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

Petitioner seeks review of the decision and judgment of the United States Court of Appeals for the District of Columbia Circuit entered July 13, 2010, *Al-Adahi v. Obama*, Nos. 09-5333, 09-5339, 2010 WL 2756551 (D.C. Cir. July 13, 2010). Pet. App. 1a-24a. The decision of the District Court is *Al-Adahi v. Obama*, No. 05-280, 2009 WL 2584685 (D.D.C. Aug. 21, 2009). Pet. App. 25a-64a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered July 13, 2010.

INTRODUCTION

In *Rasul v. Bush*, 542 U.S. 466 (2004) and in *Boumediene v. Bush*, 553 U.S. 723 (2008), this Court held that the men imprisoned by the United States government at Guantánamo could challenge their confinement through the writ of habeas corpus. 542 U.S. at 476; 553 U.S. at 795. In *Boumediene*, the Court ordered the district courts to try the cases without further delay. Guantánamo habeas cases are tried

without a jury by Judges of the United States District Court for the District of Columbia.

In the instant case, the District Court heard evidence for four days, including testimony given by Mr. Al-Adahi via video link to Guantánamo. Like any witness appearing in person before the Court, Mr. Al-Adahi was subjected to the government's cross-examination. Weighing contested facts from which competing inferences could be drawn, the District Court wrote a carefully reasoned forty-two page opinion holding that the government had failed to prove by a preponderance of the evidence that Mr. Al-Adahi was a "part of" al-Qaeda. The Court therefore held that he could not be detained by the government.

The Court of Appeals reversed and, in doing so, departed from the accepted and usual course of judicial proceedings and committed two errors widely applicable to other cases, including pending habeas cases. Those errors were: (1) substituting its judgment of the facts for that of the experienced trial court by imposing on the "clearly erroneous" standard of review a sophistic, undefined "conditional probability" standard drawn from mathematics; and as a part thereof, (2) interpreting the Authorization for the Use of Military Force as creating an irrebuttable presumption that a stay at an al-Qaeda/Taliban guest house or attendance at a training camp authorizes indefinite detention.

STATEMENT OF THE CASE

Petitioner is a citizen of Yemen and a long time employee of the Yemen Oil Company who traveled with his sister to Afghanistan in July 2001. Pet. App.

68a, 72a-73a. Mr. Al-Adahi was detained by Pakistani police near Peshawar, Pakistan in October 2001. Pet. App. 85a.

A. Petitioner's travel to Afghanistan

In July 2001, a forty-year old Mr. Al-Adahi was a twenty-year employee of the Yemen Oil Company with a wife and two children, then aged three and five. Pet. App. 66a-70a, 88a. Mr. Al-Adahi had never left Yemen before and had never heard of Al Qaeda. Pet. App. 67a-68a, 78a. His sister, Amani, was married by contract, as is the custom in Yemen, to a man in Afghanistan. Pet. App. 67a-68a. Traditional Yemeni women do not travel alone. In July 2001, Mr. Al-Adahi applied for and received a six-month leave of absence from his job to take his sister to Afghanistan.[1] Pet. App. 82a.

The trip was arranged by his soon to be brother-in-law, Riyadh, a man close to Usama bin Laden, but known only casually by Mr. Al-Adahi. Pet. App. 67a-70a. Mr. Al-Adahi had never traveled before and did not know how to obtain a passport or visa. Pet. App. 68a. Riyadh told him to meet a man named Ali Yayha in front of a certain bank and to wear a red coat so Yayha would recognize him. Pet. App. 70a-71a. Mr. Al-Adahi did so and received passports, travel visas and airline tickets in his name and his sister's name. Pet. App. 68a-73a. Mr. Al-Adahi's passport was in his possession when he was arrested in Pakistan in 2001. Pet. App. 79a-80a.

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[1] No evidence suggested that such a leave of absence was anything but common in Yemen.

B. Petitioner's activities in Afghanistan

Usama bin Laden hosted the celebration of Amani and Riyadh's marriage for male guests in July 2001 in Kandahar, Afghanistan. Pet. App. 89a. Mr. Al-Adahi met bin Laden there for the first time and was summoned to meet him the next week. Pet. App. 74a-77a. Usama bin Laden met with foreigners--that is, Arabs--arriving in Kandahar to determine whether they were dangerous to him, and bin Laden quizzed Mr. Al-Adahi for 5-10 minutes about people in Yemen to make sure he was in fact a Yemeni.[2] *Id.* Thereafter, Mr. Al-Adahi stayed for a period in the home of his new brother-in-law, Riyadh, whom the Court of Appeals refers to as "al-Qaida". Pet. App. 9a, 80a. With several months on his hands, Mr. Al-Adahi went to a guest house and then to Al Farouq, an Al Qaeda and Taliban training camp, for one week. Al-Adahi testified he wanted general weapons training and "Islamic education." Pet. App. 80a.[3] The program at Al Farouq consisted of basic weapons training for the first two weeks. Pet. App. 93a.

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[2] The Court of Appeals found this explanation "utterly implausible" because by 2001 bin Laden was in hiding, the Court found. Pet. App. 11a-12a. The Court's inference is contradicted by the evidence. In July 2001, though bin Laden had been targeted by the United States, he in fact was living occasionally at his compound in Kandahar, was considered the "governor" of Kandahar, and hosted the male wedding celebration at his compound. Pet. App. 74a, 89a. The evidence and common sense suggest that *because* bin Laden was targeted that he would check out strangers coming to Kandahar who might encounter him to determine whether they posed a danger.

[3] The Court of Appeals erroneously interpreted "Arabs" to mean "Muslims." Pet. App. 13a.

Mr. Al-Adahi refused to follow orders at Al Farouq and was expelled from the camp after one week. Pet. App. 80a, 86a. No evidence suggests Mr. Al-Adahi was trained in skills for terrorism. After leaving the camp, Mr. Al-Adahi traveled to other cities in Afghanistan. Pet. App. 81a-82a. He was injured slightly riding a motorcycle. Pet. App. 85a.[4] The United States started bombing Afghanistan on October 7, 2001. Pet. App. 199a, ¶ 42.

C. Petitioner's arrest in Pakistan

After his motorcycle accident, Mr. Al-Adahi went to a hospital to have his arm treated and found there other men who were leaving Afghanistan by bus.[5] Pet. App. 85a. Mr. Al-Adahi joined them. *Id.* Near Peshawar, Pakistan Mr. Al-Adahi was taken off the bus by Pakistani authorities and taken to a local hospital. *Id.* He was told he would be turned over to

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[4] Respondents assert Mr. Al-Adahi told inconsistent stories to interrogators about his injury. They did not call any of those witnesses to testify, did not supply any transcripts or videotapes of interrogations and, most oddly, did not cross examine Mr. Al-Adahi on the subject when he testified. Thus, the accounts given by his interrogators came before the District Court (over Petitioner's objection) only through written reports, the authors of which could not be cross examined.

[5] Most likely – though the record is silent on the point—the men were wounded in the intensive American bombing which affected soldiers and civilians alike. The Wall Street Journal recently reported that bombing was insufficiently precise that a December 2001 meeting between American agents and Hamid Karzai, the man chosen to lead the new government of Afghanistan, was targeted. Siobhan Gorman, *CIA Man is Key to U.S. Relations with Karzai*, WALL ST. J., Aug. 24, 2010, at A8.

the Yemeni embassy. *Id.* Instead, he was arrested and, he believes, sold for a bounty to the United States. Pet. App. 84a. In his pocket were his passport and airline tickets home to Yemen. Pet. App. 79a-80a, 85a. He carried no weapon. On his wrist was a common Casio watch, with hands, not an electronic version.[6] Pet. App. 87a. Mr. Al-Adahi was sent to Guantánamo eight and one half years ago.

D. The detention standard

Following the attack on the United States on September 11, 2001, Congress passed the "Authorization for the Use of Military Force" ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224 (2001). The AUMF does not specifically mention detention of enemy armed forces. Interpreting the AUMF, the District Court adopted the following broad standard, widely used in Guantánamo cases,[7] against which to test the facts relevant to Mr. Al-Adahi:

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[6] The Government has consistently claimed that Casio watches are linked to al-Qaeda and terrorist activity – notwithstanding that Casio had built such "an avid following among collectors world-wide over the years" that 19 million of the Casio brand watch "G-Shock" alone had been sold worldwide by 1998. G-Shock, WIKIPEDIA.ORG, http://en.wikipedia.org/wiki/G-Shock (last visited Sept. 22, 2010). In any event, Mr. Al-Adahi testified that his watch had hands and was not an electronic version. Pet. App. 87a. Respondents had possession of Mr. Al-Adahi's watch but did not offer it in evidence. That his watch had hands, not an electronic version used to detonate bombs, is not contradicted in the record.

[7] Some of the other District Judges used a standard more favorable to the detainee. *See Hamlily v. Obama*, 616 F. Supp. 2d 63, 76 (D.D.C. 2009) (excluding from detention those who were only "substantial support[ers]" of the Taliban or al-Qaeda).

> the Government has the authority to detain individuals who were part of, or substantially supported, al-Qaida and/or the Taliban, provided that those terms "are interpreted to encompass only individuals who were members of the enemy organization's armed forces, as that term is intended under the laws of war, at the time of their capture."

Pet. App. 30a. The question as presented by the government was thus whether Mr. Al-Adahi was part of or substantially supported al-Qaeda[8] as a member of al-Qaeda's forces.

E. Petition and Response

Following this Court's decision in *Rasul*, a petition for habeas corpus was filed February 7, 2005 on behalf of Mr. Al-Adahi by his mother as next friend. Pet. App. 26a.[9]

In its response, the government claimed that Mr. Al-Adahi was held properly as an "enemy combatant," a characterization they have since abandoned. Pet. App. 29a. The government relied principally on the

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[8] Respondents have never contended Mr. Al-Adahi was part of the Taliban.

[9] At the time, the government refused to disclose who was held in Guantánamo. Filing a petition was the only way to determine that a man was there. *See Associated Press v. United States Department of Defense*, No. 05 Civ. 5468 (JSR), 2006 WL 2707395 (S.D.N.Y. Sept. 20, 2006), *rev'd*, 554 F.3d 274 (2d Cir. 2009). In the meantime, the Defense Department released publicly the names of the men held. *See* http://www.dod.gov/pubs/foi/detainees.

allegations that his brothers-in-law were Usama bin Laden bodyguards, that Mr. Al-Adahi was a bodyguard and trainer at Al Farouq, a Taliban/Al Qaeda-sponsored training camp, and that Mr. Al-Adahi possessed a Casio watch. After Mr. Al-Adahi told government interrogators that he met Usama bin Laden, stayed one night in a guest house and attended Al Farouq, for a week, those became the primary charges against him to prove that he was part of Al Qaeda's forces.[10]

Though filed in February 2005, Mr. Al-Adahi's petition was not heard on the merits until June 2009 because of the delays successfully challenged in *Boumediene*. Prior to trial, District Judge Kessler, who had this case, consolidated it with most others then pending for pre-trial proceedings before then Chief Judge Hogan, who entered a governing pre-trial order. Pet. App. 27a-28a. In this case, the District Court directed the parties to list the issues to be tried and, following a pretrial conference, entered an order directing the parties to introduce their evidence related to those issues. Pet. App. 37a. The Court granted the government a presumption of authenticity as to all of its evidence. Pet. App. 32a. All of the government's evidence was offered in the form of general affidavits and documents. The affidavits were not specific to Mr. Al-Adahi (none mentioned his name

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[10] The government also contended that Mr. Al-Adahi was an instructor at Al Farouq and a bin Laden bodyguard in 2000. Pet. App. 48a, 53a. Those allegations, based on the statements of Janko and Bukhary, two Guantánamo detainees who even the government interrogators found to be not credible, made no sense in any possible time line.

or government-assigned number) but were used in many habeas hearings. Pet. App. 31a.

F. The District Court trial

On June 22-25, 2009, Petitioner's habeas trial proceeded in the United States District Court for the District of Columbia. Mr. Al-Adahi testified live on his own behalf and was subjected to cross examination by government attorneys. The District Court observed his testimony[11] and heard argument for an additional three and one half days about the inferences and conclusions to be drawn from the government's evidence. Despite the plurality's invitation in *Hamdi v. Rumsfeld*, no intelligence expert testified or offered an affidavit opining that Mr. Al-Adahi was linked to al-Qaeda. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533-34 (2004). The government relied exclusively on hearsay evidence,[12] including short summaries of interviews prepared by interrogators at Guantánamo following hours-long interviews of Mr. Al-Adahi.[13] The

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[11] While the District Court did not explicitly state its view of Mr. Al-Adahi's credibility, that the Court relied on his testimony establishes that it found him credible as to some issues. *See., e.g.*, Pet. App. 40a, 42a-43a, 45a.

[12] Hearsay, including certification of the "true cause of the detention" is routine and appropriate in post conviction proceedings. 28 U.S.C. § 2243; *e.g., Sawyer v. Whitley*, 505 U.S. 333, 349-50 (1992). By contrast, in *Hamdi v. Rumsfeld* the plurality found that "[h]earsay . . . may need to be accepted as the most reliable available evidence. . . ." 542 U.S. at 533-34. Here, there was no showing of "need."

[13] Petitioner objected to the admission of Respondents' hearsay evidence as violative of the Federal Rules of Evidence, which are

government relied on no "battlefield evidence," because none existed.[14]

G. The District Court considered the facts under the detention standard

The government produced no evidence that Mr. Al-Adahi was involved in combat against the United States or its allies. As he testified, he does not "support killing innocents" and has "never participated in any fight." Pet. App. 90a-91a. He never committed or conspired to commit any terrorist acts. He had no fore-knowledge of the tragic events of 9/11. Apart from one week at a training camp in Afghanistan, Mr. Al-Adahi never was in a command structure and, in the week at camp, he refused to take orders. Indeed, he was thrown out of the camp for smoking cigarettes.[15] He never pledged his allegiance to Usama bin Laden or to

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specifically made applicable to habeas proceedings in Rule 1101(e), and as violative of the confrontation clause of the Sixth Amendment to the Constitution since these proceedings could result in indefinite incarceration. *Crawford v. Washington*, 541 U.S. 36 (2004). The District Court overruled Petitioner's objections and admitted all of Respondents' evidence. Pet. App. 34a.

[14] Had Mr. Al-Adahi been detained on a battlefield, that evidence would have been produced. The government told the Court in *Hamdi* that "documentation regarding battlefield detainees already is kept in the ordinary course of military affairs." *Hamdi*, 542 U.S. at 534.

[15] Smoking was a repudiation of bin Laden's Wahhabism. *See, e.g.*, Charles Allen, *God's Terrorists: The Wahhabi Cult and Hidden Roots of Modern Jihad* 56 (2006) ("Although Al-Wahhab's main targets were the Sufis and the Shias . . . many everyday habits were also declared sinful, among them smoking tobacco.")

al-Qaeda. The government has never suggested that Mr. Al-Adahi would be charged with any crime, but the government opposes his release to return home to his family in Yemen, where he was headed when detained by Pakistani authorities. Pet. App. 83a-84a. Mr. Al-Adahi testified through an interpreter:

> When people start to get afraid that America will bomb Afghanistan, and I have been trying to find a way to get out and go back to my country. I did not fight the American. I did not fight the American alliance. I did not deal with Taliban or Al Qaeda. I am a working man in my country. I never committed a crime. I am 47 years old.

Id.

The District Court was left to consider the facts, some disputed, from which to draw inferences and then to consider all of the facts taken together. Each disputed fact gave rise to multiple potential inferences. The District Court explicitly considered each of the issues individually and then considered them as a whole: "When all is said and done, this is the evidence we have in this case," the Court wrote. Pet. App. 60a. The Court then listed each of the facts upon which the government relied and considered them as a whole. In doing so, this trial judge with thirty years' experience, carried out the function described in *Anderson v. City of Bessemer*, 470 U.S. 564, 574-75 (1985): "The trial judge's major role is the determination of fact, and with experience in fulfilling that rule comes expertise." The Court concluded that the government had failed to carry its burden to prove by a preponderance of evidence its factual allegation that Petitioner was part

of al-Qaeda. The Court granted his petition for habeas corpus.

II. The Court of Appeals' Decision

The government appealed. On July 13, 2010, the Court of Appeals reversed and instructed the trial court to deny the petition for habeas corpus. Pet. App. 21a. The Court of Appeals began its review of the factual determinations by stating, "but before we get to the specifics we need to mention an error that affects much of the district court's evaluation of the evidence. The error stems from the court's failure to appreciate conditional probability analysis." Pet. App. 7a-8a. The Court goes on to cite a single 1993 decision by the same court related to probable cause determinations, *United States v. Prandy-Binett*, 5 F.3d 558 (D.C. Cir. 1993), and a popular paperback book from 1988, "*Innumeracy: Mathematical Illiteracy and its Consequences,*" by J. A. Paulos, a Professor of Mathematics.[16]

Relying on that authority, the Court of Appeals found that if the District Court had used conditional probability analysis, it would have viewed differently the evidence as a whole. Purporting to use "conditional probability," the Court weighed the evidence and came to the factual conclusion that "there can be no doubt that Al-Adahi was more likely than not part of al-Qaida." Pet. App. 9a. The Court went on to elevate

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[16] Dr. Paulos is a professor at Temple, whose most recent book is *Irreligion: A Mathematician Explains Why the Arguments for God Just Don't Add Up* (2008).

dicta from *Al-Bihana v. Obama*, 590 F.3d 866 (D.C. Cir. 2010) to a determination of law:

> His attendance at an al-Qaida military training camp is therefore—to put it mildly—strong evidence that he was part of al-Qaida. In *Al-Bihani*, we stated that if a person stays at an al-Qaida guesthouse or attends an al-Qaida training camp, this constitutes "overwhelming" evidence that the United States had authority to detain that person.

Pet. App. 15a-16a (citing 590 F.3d at 873, n.2). The Court of Appeals found that evidence alone was sufficient: "We disagree that this evidence, standing alone, was insufficient." Pet App. 16a. The Court thus redefined the detention standard under the AUMF to include as an alleged enemy combatant someone who stayed in al Qaeda/Taliban guest house or training camp.

REASONS FOR GRANTING THE WRIT

This case raises crucial issues by imposing a new sophism, "conditional probability," as a standard of appellate review for any case in which the district court sits without a jury. "Conditional probability" was described by the dissent in *United States v. Prandy-Binett*, as "nothing more than gobbledy-gook." 995 F.2d 1069, 1077 (D.C. Cir. 1993) (Edwards, J., dissenting). *Prandy-Binett* is a probable cause opinion in which the D.C. Circuit properly[17] utilized the de novo appellate standard to review the legal conclusion of whether

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[17] *See Ornelas v. United States*, 517 U.S. 690 (1996).

probable cause existed to warrant arrest. But, in this case, the clearly erroneous standard applied to factual findings, not a de novo standard. The Circuit used its faux statistical conditional probability methodology to authorize the appellate court in any non-jury case to substitute its judgment on the facts for that of trier of facts. In doing so, the court upended the deeply rooted and clearly understood roles of the trial and appellate courts.

In addition, the Court of Appeals' direction that staying at guest houses or training camps is sufficient evidence to prove that a man is part of al-Qaeda (Pet. App. 13a-14a), is contrary to the plurality's detention standard in *Hamdi v. Rumsfeld*, 542 U.S. at 526. Perhaps one-hundred petitioners have cases pending in the District Court for the District of Columbia governed by the Circuit's erroneous opinion in *Al-Adahi*. If the erroneous standard is not corrected, those cases will be tried on the wrong legal and factual premises.[18]

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[18] In *Boumediene*, the Court directed the District Courts to try the petitioners' habeas cases without further delay. 553 U.S. at 794. While they have proceeded to do so, hearing facts and deciding that the men are held improperly in 37 cases, the Court of Appeals has relentlessly ruled against petitioners. In only one case has a panel of the Circuit found for the detainee. *Compare Bensayah v. Obama*, 610 F.3d 718 (D.C. Cir. 2010) (remanded for further consideration by the District Court) *with Al-Bihana*, 590 F.3d 866; *Awad v. Obama*, 608 F.3d 1, 4 (D.C. Cir. 2010); *Barhoumi v. Obama*, 609 F.3d 416, 418-19 (D.C. Cir. 2010); *Al Odah v. United States*, 611 F.3d 8, 11 (D.C. Cir. 2010).

A. The Court of Appeals impermissibly imposed on this and other District Court cases a "conditional probability" gloss on Anderson in substituting its judgment of the facts for the decision of the experienced District Court.

This Court's appellate standard of review is unequivocal in its deference to the District Court in circumstances such as these. Federal Rule of Civil Procedure 52(a)(6) states:

> Findings of Fact . . . must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.

Thus, when a District Court makes findings of fact, it cannot be reversed unless its decision is clearly erroneous, a concept the meaning of which is "not immediately apparent." *Anderson*, 470 U.S. at 573. The Court set forth principles governing that concept, the foremost of which is that "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id.* (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

But that principle has limitations:

> This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty

> under Rule 52(a) if it undertakes to duplicate the role of the lower court.

Id. Plainly, the Court of Appeals would and did decide *Al-Adahi* differently from the District Court which heard the case for four days. But in doing so, it violated *Zenith Radio Corp v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969), by using conditional probability in "deciding the factual issues *de novo*." As the Court observed in *Anderson*, "[d]uplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources." 470 U.S. at 574-75. Here, the appellate court only detracts from the accuracy of the decision; the crucial evidence was the live testimony of Mr. Al-Adahi.

The instructions in *Anderson* continue: if the findings were plausible, which the District Court's plainly were, they cannot be reversed. And there is more: "Where there are two permissible views of the evidence, *the factfinder's choice between them cannot be clearly erroneous.*" *Id.* at 574 (emphasis added)

> This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts.

Id. Before demonstrating that the District Court's rejection of the government's contentions was more than merely "permissible," the Court of Appeals' error in substituting its judgment for that of the District Court bears analysis.

The Court of Appeals stated:

> [B]ut before we get to the specifics we need to mention an error that affects much of the district court's evaluation of the evidence. The error stems from the court's failure to appreciate conditional probability analysis.

Pet. App. 7a-8a. The Court of Appeals' decision creating the concept of "conditional probability," *United States v. Prandy-Binett*, 5 F.3d 558 (D.C. Cir. 1993), involved probable cause, not the preponderance standard applicable here. The legal principle of "probable cause" is not a "'finely-tuned standard[],' comparable to the standards of proof beyond a reasonable doubt or of proof by a preponderance of the evidence." *Ornelas v. United States*, 517 U.S. 690, 696 (1996) (quoting *Illinois v. Gates*, 462 U.S. 213, 235 (1983)). This Court in *Ornelas* held that determination of "probable cause should be reviewed de novo on appeal." 517 U.S. at 699.[19]

But what is "conditional probability"? The Circuit does not define it more than to say that "some events are independent (coin flips, for example), other events are dependent: 'the occurrence of one of them makes the occurrence of the other more or less likely. . . .'" Pet. App. 8a. That "definition" is then used to support the Circuit's view of the evidence in *Al-Adahi*.

In *Prandy-Binett* the district court suppressed evidence, finding no probable cause for a search and

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[19] *Ornelas* was decided after *Prandy-Binett*, but the *Ornelas* standard was in use in *Prandy-Binett*. 995 F.2d at 1079 n.5.

that was the issue for review. The measure of probable cause lies, according to the Court, "[s]omewhere between less than evidence which would justify . . . conviction and more than bare suspicion." 995 F.2d at 1070 (second alteration in original and internal quotation marks omitted). The appellate standard of review was de novo for the legal conclusion of no probable cause and clearly erroneous for facts found. 995 F.2d at 1079 n.5.

The dissent in *Prandy-Binett* stated the majority was simply substituting its judgment about the facts by using "conditional probability."

> The majority, relying on a bizarre theory of "conditional probabilities," holds that probable cause can be based on the appearance of duct tape.

995 F.2d at 1074 (Edwards, J., dissenting). It continued:

> In order to reach the conclusion that Prandy-Binett was legally arrested, the majority purports to examine so-called "conditional probabilities," as if to suggest that there is some mathematical equation. . . . But, stripped of the fancy label, the discussion of conditional probabilities is nothing more than gobbledy-gook that in no way obscures the sad truths in this case.

Id. at 1077. The Circuit here used that "fancy label" to substitute its view of the facts.

The Court of Appeals' use of "conditional probability" is simply wrong. Fact finding is not a science nor is it mathematics. It is, at its core, testimonial. "Nothing can be more essential that the cross-examining [of] witnesses, and generally before the triers of the facts in question. . . . [W]ritten evidence . . . [is] almost useless; it must be frequently taken ex parte, and but very seldom leads to the proper discovery of truth." *Crawford v. Washington*, 541 U.S. 36, 49 (2004) (alteration in original) (quoting R. Lee, *Letter IV by the Federal Farmer* (Oct. 15, 1787) (Sixth Amendment case)). "The common-law tradition is one of live testimony in court subject to adversarial testing. . . ." 541 U.S. at 43. The government offered no excuse why not even one of their witnesses could come to trial.

The District Court properly considered and weighed all of the evidence, and drew perfectly plausible inferences. First, the District Court included a lengthy discussion explaining that, while the evidence is viewed in its totality, that does not mean that the sum of all the evidence is necessarily more credible than its parts standing alone:

> Even using the Government's theoretical model of a mosaic, it must be acknowledged that the mosaic theory is only as persuasive as the tiles which compose it and the glue which binds them together -- just as a brick wall is only as strong as the individual bricks which support it and the cement that keeps the bricks in place. Therefore, if the individual pieces of a mosaic are inherently flawed or do not fit together, then the mosaic will split apart, just as the brick wall will collapse.

Pet. App. 35a-36a. Before discussing the allegations and evidence, the District Court concluded "that existing evidence must be weighed and evaluated as to its strength, its reliability, and the degree to which it is corroborated." Pet. App. 36a.

Since no direct or objective evidence places Mr. Al-Adahi as supporting al-Qaida as a member of its forces, the trial court carefully and exhaustively considered his testimony and the government's circumstantial evidence. The Court considered the weight to give to Mr. Al-Adahi's travel to Afghanistan, the fact that his new brother-in-law likely was a member of al-Qaeda and the fact that Mr. Al-Adahi met bin Laden twice. Pet. App. 37a-41a. Mr. Al-Adahi met Usama bin Laden at the wedding celebration and then was summoned to meet with him for 5-10 minutes two weeks after Al-Adahi's arrival in Afghanistan. Pet. App. 76a-77a. Mr. Al-Adahi testified that bin Laden was in Kandahar and wanted to determine whether Mr. Al-Adahi really was a Yemeni. Pet. App. 76a. That explanation is perfectly logical--as the government argued, bin Laden knew he was marked. He met newcomers to Kandahar to determine if they were dangerous to him. Under the applicable detention standard, the facts prove little.

The Court of Appeals, however, considered the evidence de novo. It began with "Al-Adahi's ties to Bin Laden" and says the District Court "tossed aside" the fact. Pet. App. 9a. It did nothing of the sort. What the Circuit Court terms a failure to consider conditional probability was in fact the District Court engaging in determining credibility and drawing inferences incumbent on all fact finders. It concluded that Al-Adahi's brother-in-law's close association with bin

Laden and Al-Adahi meeting him offer little evidence that Al-Adahi was himself a member of Al Qaeda. Pet. App. 37a-41a. The District Court obviously was correct. The Court drew the clearly permissible inference under *Anderson* that Al-Adahi took his sister to Afghanistan and, finding that her husband-to-be was a friend of Usama bin Laden, met him. These facts, it found, say little about Mr. Al-Adahi taking orders from or being part of the al-Qaeda structure. *Id.*

But the Court of Appeals preferred the government's inference: "That close association [with bin Laden] made it far more likely that Al-Adahi was or became part of the organization." Pet. App. 12a. The Court of Appeals found Mr. Al-Adahi's testimony about meeting with bin Laden "utterly implausible" citing only the government's brief. Thus, the Court of Appeals would draw some nefarious conclusion from the 5-10 minute meeting. The District Court accepted the testimony rather than the scoff, and the Court of Appeals, not having seen Mr. Al-Adahi's testimony, had no basis for substituting its judgment. "When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Anderson*, 470 U.S. at 575.

What inference can be drawn from the fact that Mr. Al-Adahi stayed in a guest house one night? One inference is that, having met bin Laden and with a new al-Qaeda brother-in-law, he was on his way to membership in al-Qaeda, albeit not yet there. Pet. App. 13a-14a. Another is his testimony that, like most

of the world, he had never heard of al-Qaeda before 9/11 and that he slept at the guest house one night to be with other Arabs rather than to join al-Qaeda. He testified: "The guesthouses are the gathering of the Arab and the Muslim. I met some Arab, and they suggested that I go to this guest house. You will meet people instead of being alone." Pet. App. 79a. Mr. Al-Adahi *was* isolated—in Afghanistan, the dominant languages are Pashto and Dari (a Persian dialect), not Arabic.[20] The District Court rejected the government's proposed inference.

The most important fact from the government's view point was Mr. Al-Adahi's testimony that he spent one week at Al Farouq and then was kicked out. Pet. App. 80a. One inference: Mr. Al-Adahi became part of Al Qaeda, albeit quickly and at the bottom. Another inference: his live testimony that he did not know what Al Farouq was, that he went there for Islamic studies and weapons training, after one week was expelled, and never joined or became part of al-Qaeda. Pet. App. 80a, 83a-84a.[21] The District Court found a logical inference based on live testimony from Mr. Al-Adahi, which "demands even greater deference to the trial court's findings;" the appellate court cannot reject it under *Anderson*. 470 U.S. at 575. But that is exactly what the Court of Appeals did, concluding that it is not "important to determine Al-Adahi's motive for attending the al Qaida training camp." Pet. App. 15a.

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[20] http:en.Wikipedia.org/wicki/Languages-of-Afghanistan.

[21] The government argues quite improbably that having compulsory service in the Yemeni army 20 years earlier was enough training. Pet. App. 15a. That argument suggests little knowledge of the evolution of modern weapons.

Applying the convenient conditional probability theory,[22] the Court of Appeals finds Mr. Al-Adahi's time spent at Al Farouq to be overwhelming and conclusive evidence that he is part of al-Qaeda.[23] Pet. App. 15a-16a (finding that this evidence standing alone is sufficient).

That the government, or any advocate, could string together six or seven facts, each with a non-culpable inference, does not prove the important conclusion--that Mr. Al-Adahi became part of al-Qaeda. Indeed, those inferences are contrary to the undisputed evidence that al-Qaeda was a small organization, made up mostly of educated Egyptians and Saudis, and that it looked for men "who were white-collar, skilled,

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[22] Contrary to the Court of Appeals' belief, to the extent conditional probability is understood as a statistical or mathematical model, the District Court used it accurately. One first sorts through the facts, rejecting those that are unreliable. Thereafter, a statistician, mathematician or, in this case a judge, considers those that remain to reach a conclusion. But the art of judging facts cannot be reduced to a simple mathematical formula. As Dr. Paulos himself has acknowledged: "One must be careful when dealing with conditional probabilities." Paul L. Kaminsky, Note and Comment, *The Wrap on Probable Cause: The Fourth Amendment Contained*, 6 ST. THOMAS L. REV. 449, 471-72 (1994) (quoting John A. Paulos, *Beyond Numeracy: Ruminations of a Numbers Man*, 190 (1991)). Mathematical "applications are only as good as the underlying empirical assumptions, simplifications, and estimations that go into them." J. A. Paulos, *Innumeracy*, 67 (1988).

[23] The Court of Appeals dwells on related issues—Mr. Al-Adahi's knowledge of Al Farouq and bin Laden bodyguards. The government made no attempt to distinguish his knowledge in 2001 from what he learned during several years in Guantánamo. Pet. App. 14a, 17a-18a.

multi-lingual (usually speaking a Western language), wealthy, well educated and equipped with special talents advantageous to the organization." Pet. App. 111a-112a, ¶ 30. Al-Adahi was far from that description, was not a candidate for Al Qaeda, and the District Court properly drew that inference based on the evidence as a whole, including Al-Adahi's live testimony.

Al-Adahi's circumstances are quite different from the government's assertions that the Circuit has found sufficient for detention. Al-Bihani was a cook for a the 55th Arab Brigade in Afghanistan, which the Circuit found sufficient to be part of an Al Qaeda or Taliban force. *Al-Bihana*, 590 F.3d at 872.[24] Ali Awad allegedly fought with Al Qaeda fighters in a hospital in Afghanistan. *Awad v. Obama*, 608 F.3d at 4. Barhoumi, the government claimed, trained in "tactical movement, navigation, artillery and military tactics" and fought with Abu Zubaydah "a reputed terrorist leader." *Barhoumi,* 609 F.3d at 418-19. Al Odah, Respondents assert, fought with 150 men at Tora Bora and carried an AK-47. *Al Odah*, 611 F.3d at 11.

Here, lacking a nexus to al-Qaeda, the Court of Appeals went so far as to make up facts not in the record, such as its paragraph devoted to the Al Qaeda training manual for resisting interrogation. Pet. App. p. 19a-20a. That document, found in Great Britain, is not linked in the record to Mr. Al-Adahi. The Court of Appeals further accepts the government's inference

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[24] These cases are cited to show the allegedly different facts, not to suggest in any way that they were correctly decided.

that Mr. Al-Adahi's travels in Afghanistan before the American bombing started in October 7, 2001 added weight to the government's arguments that he must have been fighting for al-Qaeda. Pet. App. 18a-19a. How is not explained; apart from the Taliban civil war, this record is devoid of evidence about al-Qaeda fighting the United States or its allies before Mr. Al-Adahi was arrested or how he could have followed order to "persist in the jihad" (Pet. App. 19a), which the appellate court said Mr. Al-Adahi did.[25]

Thus, the Court of Appeals continued its pattern of frustrating the decisions of this Court. As shown above, it made up facts not in the record and cited to the government's brief in the absence of other support. The Supreme Court reversed the D.C. Circuit in *Rasul v. Bush*, 542 U.S. 466 (2004), *rev'g* 321 F.3d 1134 (D.C. Cir. 2003); in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), *rev'g* 415 F.3d 33 (D.C. Cir. 2005); and in *Boumediene v. Bush*, 553 U.S. 723 (2008), *rev'g* 476 F.3d 981 (D.C. Cir. 2007).[26]

The Court of Appeals never gave Petitioner a chance to rebut its interpretation of the facts.[27]

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[25] At that time, there were no more than 300 U.S. troops on the ground. Pet. Supp. App. Ex. 120a ¶ 44.

[26] All Guantánamo habeas cases came through the District of Columbia Circuit.

[27] The Circuit Court expressed its frustration with the government's unwillingness to urge a burden of proof lower than preponderance. In the District Court, Petitioner asked for a standard of clear and convincing evidence, the standard for civil commitment. *Addington v. Texas*, 441 U.S. 418 (1979). The government argued for, and the District Court accepted, a

"Conditional probability" was never mentioned by the government, the District Court or the Court of Appeals before the appellate court issued its opinion. As this Court explained in *Anderson*, "the trial on the merits should be the main event . . . rather than a tryout on the road." 470 U.S. at 575 (citation and internal quotations omitted).

This Court should exercise its supervisory powers because "conditional probability" is an amorphous concept that erroneously suggests that fact finding is a science. As such it can be used as "law" by a circuit court to substitute its judgment for that of the district court on issues of fact. *Anderson* demanded deference for the trial court fact finding. 470 U.S. at 573-76. In *Al-Adahi*, the Circuit reasserts its muscle. It is now the law of the D.C. Circuit that conditional probability can be used to permit the Circuit Court to become the fact-finder. This Court should overturn the Circuit's decision here.

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preponderance standard. Dissatisfied, after oral argument, the Circuit ordered the parties to brief the proper burden of proof, even though neither party had presented that issue on appeal. Pet. App. 6a. The parties agreed that preponderance or higher was the proper burden. The Circuit chided the government and made it known it would accept a lower burden of proof, despite this plurality's rejection of the government's "some evidence" standard in *Hamdi*, 542 U.S. at 527-528. *Id.*

B. Ordering the District Courts to find that a stay at a guest house in Afghanistan or attendance at a training camp is overwhelming and sufficient evidence that a man is properly held is erroneous and may lead to error in many of the one hundred cases remaining to be tried.

The Court of Appeals added impermissibly to the AUMF by significantly weakening the standard for detention. The plurality in *Hamdi* found:

> Under the definition of enemy combatant that we accept today as falling within the scope of Congress' authorization, Hamdi would need to be "part of or supporting forces hostile to the United States or coalition partners" and "engaged in an armed conflict against the United States" to justify his detention in the United States for the duration of the relevant conflict.

542 U.S. at 526. That standard is far more rigorous than a stay at a guest house or a short stay at a al-Qaeda/Taliban training camp. But the Court of Appeals has found that such a visit is overwhelming and sufficient evidence that a man is properly detained. Pet. App. 13a-14a. That evidentiary ruling imposes an irrebuttable presumption--one the Court of Appeals found was not overcome even by leaving the training camp after a week. The AUMF does not support such a facile interpretation.

Indeed this holding is the most dangerous for many of the petitioners yet to come before the district courts. Attendance at one or the other is a frequent charge by

the government's largely discredited detainee-witnesses. Pet. App. 48a-54a. In addition, much evidence and logic is to the contrary. Not surprisingly, Holiday Inns were scarce in Afghanistan and the evidence is overwhelming that guest houses were where visitors stayed. Pet. App. 102a-103a, ¶ 15. The provenance of those guesthouses was not always known and even an intentional stay in an al-Qaeda guest house hardly makes a man part of the al-Qaeda forces.

The same is true about a one-week stay at Al Farouq. Even if Mr. Al-Adahi intended to abandon his wife, children and job in Yemen—a proposition unlikely on its face—attendance for a week at a training camp may be the first, but far from the final step in becoming part of such a force. To say the least, there are two permissible views of the evidence, and that should be the end of the matter. *Anderson*, 470 U.S. at 574. The Court's postulate of overwhelming evidence is based on no principled analysis. It is ipsi dixit and should be reversed.

CONCLUSION

The decision by the Court of Appeals is erroneous and likely to lead to error in later decisions. The appellate court has added an erroneous gloss to this Court's clear decision in *Anderson*. In addition, its command to the district court's to find facts as overwhelming evidence of proper detention is sure to work mischief in the District Courts' consideration of the evidence supporting a man's potential lifetime detention. *See Hamdi*, 542 U.S at 521.

Petitioner requests that this Court grant his petition and reverse the decision of the Court of Appeals.

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